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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/777,418

02/06/2001

Grant D. Green

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12/28/2006

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Los Altos, CA 94022-2143

EXAMINER

WEINSTEIN, STEVEN L

ART UNIT

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Please find below and/or attached an Office communication concerning this application or proceeding.



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APPLICATION NO./ CONTROL NO.	FILING DATE	FIRST NAMED INVENTOR / PATENT IN REEXAMINATION	ATTORNEY DOCKET NO.
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EXAMINER

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Commissioner for Patents

This supplemental Office communication is responsive to the Appeal Center communication mailed 12/5/06. The Appeal Center communication notes that the Examiner's Answer omitted Heading #11. Accordingly, the Answer has been corrected to add the heading in question and the related text. This current Office communication includes an attached corrected copy of the Examiner's Answer.

Steve Weinstein
STEVE WEINSTEIN
PRIMARY EXAMINER 1761
12/22/06



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/777,418
Filing Date: February 06, 2001
Appellant(s): GREEN, GRANT D.

MAILED
DEC 28 2006
GROUP 1700

EXAMINER'S ANSWER



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GROUP 1700

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/777,418
Filing Date: February 06, 2001
Appellant(s): GREEN, GRANT D.

EXAMINER'S ANSWER

This is in response to the appeal brief filed 7/20/06 appealing from the Office action mailed 3/22/04

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

It is noted that although Appellant had used the proper heading "Summary of Claimed Subject Matter" in the last, second, non-compliant brief (filed 12/7/05), the current pending Brief has reverted back to the improper heading employed in the first non-compliant Brief filed 3/22/05 (i.e., "Status of Amendments"). This then would appear to be an inadvertent typographical error. To expedite prosecution, and because the content of Section V appears to be in the spirit of current Appeal practice, the Examiner is construing the improper heading to read "Summary of Claimed Subject Matter".

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct. Appellant notes that a separate rejection of claim 24, made in the Office action mailed 5/22/03, was dropped in the Final rejection mailed 3/22/04. This is correct. The separate rejection had been found to be superfluous.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence relied upon in the rejection of claims under appeal. Copies of the original publications corresponding to the Dialog abstracts are being mailed with the Answer. The copies of the original documents are only being placed in the record to confirm the original date of the text relied upon in the Answer.

INSTITUTIONAL DISTRIBUTION MAY 15, 1991 v.27, n6, p.158(3)

STAR TRIBUNE November 22, 1989 Edition: METRO, Section: TASTE

Page 04T

WOMANS DAY ENCYCLOPEDIA OF COOKERY 1966 p. 1784 Fawcett Publ.

FAMILY CIRCLE ILLUSTRATED LIBRARY OF COOKING 1972 p479,480

ADVERTISING AGE August 21, 1978 p.65

4,335,609 SAULSBURY 6/1982

4,840,239 SLAGG 6/1989

2,745,751 PICHARDO 5/1956

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FORBES June 2, 1997 p.196

BALTIMORE MORNING SUN Aug. 4, 1997 Section: News (Local) P. 5B

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-3, 8-10, 19, and 21-24 are rejected under 35 USC 103(a) as being unpatentable over Institutional Distribution (5/91) and Star Tribune (11/89), in view of Womans Day Encyclopedia of Cookery (1966), Family Circle, Illus. Lib. Of Cooking (1966), Advertising Age (8/1978) Saulsbury ('609), and Slagg ('239), further in view of Pichardo ('751), Forbes (6/2/97), and Baltimore Morning Sun (8/4/97).

In regard to claim 1, Institutional Distribution discloses a pre-measured portion of brown sugar enclosed in a "suitable" container, wherein the pre-measured is an amount equivalent to a pre-measured quantity of brown sugar. Specifically, Institution Distribution provides a pre-determined volume measurement (which is appellants disclosed type of measure). Appellant has defined brown sugar to include turbinado sugar and Institutional Distribution discloses turbinado sugar. It is noted that appellant's specification appears to exclude sugar that is granulated. From the specification, it is not clear if this also means crystalline. Note, too, that since turbinado sugar is crystalline, appellant's specification would appear to be inconsistent for disclosing that turbinado sugar is acceptable, yet apparently ruling out a property that turbinado sugar possesses. In any case, Institutional Distribution appears to package loosely packaged brown sugar as recited. Note, however, that whether the brown sugar product stays "loosely packaged" is a function of the well known effect of moisture conditions. Claim 1

recites that the "pre-measured" portion is equivalent to a "pre-measured" quantity of firmly packed brown sugar.

It is first noted in this regard that, as recited, any loosely packaged brown sugar would be equivalent to some measured quantity of firmly packed brown sugar. It is not seen in an article claim that the second instance of pre-measured portion is anything but a functional statement. In any case, it is also noted that all commercially packaged products are "pre-measured" for obvious economic reasons. One is not going to vary the amount of contents from one package to another package. Note that Claim 1 does not specify whether the "pre-measured quantity" is a weight or volume measurement. Institutional Distribution discloses that there are two teaspoons of sugar in the packet. Therefore, Institutional Distribution teaches providing a pre-measured volume portion of brown sugar. Since Institutional Distribution provides commercial, single-serve packets with two teaspoons of brown sugar, one would clearly have had to either initially place enough of the sugar into a volume measuring cup to obtain two teaspoons worth and then weigh out what is the equivalent weight of sugar equal to the two teaspoons (so that in a commercial packaging operation, the packaging device would then be measuring out uniform weights equal to the desired volume), or consult existing known conversion tables of weight vs. volume (wherein someone else would have already done this). If a product is known to clump, and thus create void space (which brown sugar is known to do), to create an volume measurement of the two teaspoons in Institutional Distribution, one would have to tamp or firmly pack the sugar in the volumetric measuring device to eliminate the void space (which is also conventional in

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the art). Star Tribune is relied on as further evidence of brown sugar in packets having a pre-determined volume measured amount of brown sugar (e.g., $\frac{1}{2}$ cup). It is interesting to note that Star Tribune also discloses that a volume measurement of $\frac{1}{2}$ cup of brown sugar is equal to a weight measurement of 3.5 ounces. Womans Day is relied on as further evidence of packaging brownulated sugar and that there is comparative information for substituting brownulated sugar for brown sugar. Family Circle is relied on as further evidence that it was known to provide a weight/volume relationship for firmly packed, brown sugar so that one would know how many cups of sugar equals one pound of firmly packed sugar or how much of a fraction of a pound of sugar equals one cup of firmly packed sugar. Advertising Age is relied on as further evidence to teach that the relationship between brownulated and brown sugar was also well known. Saulsbury and Slagg are relied on as further evidence that it was, of course, well known that brown sugar created problems in recipes due to its property of variably clumping, with Saulsbury further teaching leveling and/or compacting the brown sugar as needed for accuracy in measuring. Forbes is relied on as further evidence of brown sugar in packets. Pichardo is relied on as further evidence that it was notoriously conventional in the art to package products including sugar (albeit, not brown sugar) in single-serve containers wherein the products such as sugar is present in the package in pre-determined volumetric amounts such as $\frac{1}{2}$ teaspoon and 1 teaspoon. Finally, Baltimore Sun is relied on as further evidence that even brownulated sugar can clump.

Therefore, the art taken as a whole teaches appellant is not the first to provide a sugar, which is a brown sugar, in a container wherein the sugar corresponds to a pre-

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determined volume measurement and the art taken as a whole teaches that if the brown sugar has a clumping problem, one should accurately measure the volume of the brown sugar by firmly packing the brown sugar in a volume measuring device. Thus, if one construes the second instance of pre-measured quantity as imparting some limitation on the volume, then the art taken as a whole teaches that the firmly packed measurement would have been obvious. The fact is, whether there is no, some or much clumping of the sugar, if one intends to provide a volume measurement in a package, one has to either manually place the sugar in a volume measuring device and provide any tampering, if appropriate, to get an accurate measurement of volume (or consult a measures chart to find the weight/volume relationship of brown sugar). Thus, Institutional either inherently does provide brown sugar in measured portions or if one chooses not to regard the sugar of Institutional Distribution as brown sugar, it would have been obvious to package measured amounts of brown sugar in view of the art taken as a whole. Also, although silent in this regard, either Institutional Distribution would have inherently provided an amount of brown sugar equivalent to a pre-measured quantity of firmly-packed brown sugar or it would have been obvious to modify Institutional Distribution and provide an amount equal to a pre-measured quantity of firmly packed brown sugar in view of the art taken as a whole.

In regard to claims 2 and 3, once it was known to provide sugar and even brown sugar in small volume amounts, the particular volumes selected for packaging is seen to have been an obvious matter of choice. In regard to claim 8, which recites that the article comprises a plurality of pre-measured portions, each enclosed in an individual

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container, Pichardo can be relied on to teach that it is a conventional packaging arrangement in the art to provide a plurality of pre-measured portions, each enclosed in an individual container. To modify the combination and provide a number of portions, individually packed, for its art recognized and applicants intended function would therefore have been obvious. Claim 9 further recites that the pre-measured portions comprise a plurality of different sized portions, which is also shown to have been conventional by Pichardo. To further modify the combination and provide different sized portions for Pichardo's reason to allow the consumer flexibility in the amount of product used, would therefore have been obvious. In regard to claim 10, as noted above, the particular measure one chooses to package is seen to have been an obvious matter of choice. The art taken as a whole teaches at least one of the conventional recited measures (e.g. Star Tribune discloses $\frac{1}{2}$ cup). In regard to claim 20, which recites a plurality of bags, to fill more than one bag with the product is, of course, the conventional (and economically feasible) way to provide a product. See, e.g., Forbes who discusses packets of brown sugar. Claims 21-24 are rejected for the reasons given above. In regard to claim 24, which recites the bags are joined end to end in a chain, as evidenced by Pichardo, it was well established to provide packages wherein the packages are connected to each other in an end-to-end arrangement. It is also noted that this is the notoriously conventional arrangement one creates when one packages products using conventional form, fill and seal equipment.

(10) Response to Argument

All of appellant's urgings have been fully and carefully considered but are not found to be convincing. On page 12 of the Brief, it is urged that the product of Institutional Distribution is not brown sugar within the meaning of the claims as defined by the specification. This urging is totally unconvincing. On page 2, paragraph 7 of the specification, Appellant defines brown sugar as turbinado sugar, or raw sugar or similar products such as cane sugar with added molasses. Contrary to what appellant appears to be implying in the Argument in the Brief, there is no clarifier on turbinado sugar. As defined in the specification, turbinado sugar is unequivocally brown sugar. There is nothing in the record that indicates that the further description of brown sugar in paragraph 7 on page 2 refers to turbinado or raw sugar or cane sugar with added molasses. Rather, the description of sugar that has been granulated or otherwise treated to avoid caking if it does not compress or pack, describes products other than turbinado, raw sugar and molasses treated cane sugar. It is also noted in this regard that Institutional Distribution is not the only reference which discloses a pre-measured amount of brown sugar in a suitable container. Star Tribune also discloses a pre-measured amount of brown sugar in foil packets (i.e. ½ cup) whereas Forbes discloses brown sugar in packets in an undisclosed, but obviously pre-measured amount (for the reasons detailed above). Appellant urges that turbinado sugar "apparently" pours freely. There is no evidence on the record for this assertion. Whether any type of sugar can pour freely is not the issue. Even brown sugar can pour freely if it has been kept dry, whereas even

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refined, granulated sugar, if exposed to sufficient moisture, can lump or clump, and thus be hindered from pouring freely. However, this whole issue of what is brown sugar, and whether it pours freely or not, leads one away from the gist of the rejection. The rejection states that no matter what conventional particulate product one is packaging, i.e., free flowing without exhibiting clumping or free flowing but having the tendency to clump with ambient moisture, if the objective is to provide a specific volume amount of the product (and the art taken as a whole teaches the objective of providing a specific volume of particulate product, including brown sugar), one would have to have pre-measured the product by having the particulate product (or even a liquid product) completely fill the volume measure. The art taken as a whole teaches that one does this by firmly packing the particulate product to eliminate void space.

On page 12 of the Brief, and indeed throughout the Brief, appellant argues each reference separately as if they were applied alone, in a vacuum. The references are not applied under 35USC102, anticipation, but rather under 35 USC103, obviousness. For example, it is urged that Institutional Distribution does not teach a plurality of different sized portions or a plurality of bags joined end to end. Institutional Distribution does not have to teach these two expedients for the rejection to be proper, nor does the rejection rely on Institutional Distribution for these teachings. As discussed above in the body of the rejection, Pichardo is relied on to teach the conventionality of providing different sized portions of a product so that measuring the product is not required and flexibility in the

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amount used as well as the conventionality of providing packaging end-to-end. The art taken as a whole fairly teaches it would have been obvious to modify the combination and provide different sized portions for the convenience of eliminating measuring for preparing the food once the package is opened as well as the flexibility in the amount of product to be used, and to have connected packages. It is also urged that Institutional Distribution does not teach the specific amounts. As noted above, once it was known to provide products including sugar and further including brown sugar in pre-measured volume amounts so that the packaged product does not require further measuring for preparing the food product it is to be used with, the particular volume amount of the brown sugar is seen to have been an obvious matter of choice and an obvious function of the food that one is going to have the added sugar. That is, the amount of the brown sugar is seen to have been an obvious matter of intended use. Stated somewhat differently, although the art taken as a whole discloses brown sugar in pre-measured volume amounts in packets and Pichardo discloses pre-measured volume amounts geared to beverage making, the art taken as whole is seen to be a general teaching that the volume packaged would be an obvious function of the amount needed for the particular food to be made. Essentially all of appellants other remarks are seen to either repeat the error of arguing the references separately, as opposed to addressing the rejection, which is directed to the art taken as a whole, or are remarks that have been responded to in the body of the rejection. However, several additional points are noted. It is

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urged that since Star Tribune does not say that the $\frac{1}{2}$ cup of brown sugar is packed, then it does not meet the claims. It is again noted that the art taken as whole, fairly teaches that if one was packaging a volume of product one would have pre-measured the volume, whether it had the property of clumping or not, to insure one had an accurate volume measure which would have included tamping or levelling or packing the product into the measure. It would not make sense to provide a $\frac{1}{2}$ cup of brown sugar that does not have a volume measure of $\frac{1}{2}$ cup of packed brown sugar when the art taken as a whole teaches one to volume measure brown sugar by packing in the measure and unpacked brown sugar could have any volume depending on how little or how much the product has clumped (if at all). Appellant also appears to be urging that the packaged brown sugar in the art, taken as a whole, is either loosely packed, but not corresponding to a specific premeasured packed measure, or the packaged brown sugar is not loosely packed, but instead is packed brown sugar. There is no evidence that each package of brown sugar of the art taken as a whole has the sugar pressed into a shape. In fact, one would want the sugar to be "loosely packed" for ease of use. In fact, the art taken as a whole teaches it was notoriously conventional to corrolate the volume of packed brown sugar (in a volume measure to obtain an accurate measure) and the weight of that particular volume of packed brown sugar.

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11) Related Proceeding(s) Appendix

No decision rendered by a Court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed the rejection is proper and should be sustained,

Respectfully submitted,

Steven L. Weinstein
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PRIMARY EXAMINER

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Weinstein, Steven

From: AppealCenter@USPTO.GOV
Sent: Tuesday, December 05, 2006 11:54 AM
To: Weinstein, Steven
Subject: Appeal Center Application Number: 09777418

Application Number: 09777418

In the above identified application, certain deficient item(s) were identified during review. Please expeditiously attend to revision of the deficient items as noted on the Appeal Center Return form found at the link below and attached to this message.

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